Harbor Crest Electrical, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 441, AFL–CIO. Cases 21–CA–27510, 21–CA–27648, and 21–RC–18696

May 15, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On February 27, 1992, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Harbor Crest Electrical, Inc., Tustin, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent contends that the Order should be modified in light of its representation that it has ceased doing business. Any such contentions are properly dealt with in the compliance stage of this proceeding.

Yvette H. Holliday-Curtis, Esq., for the General Counsel.
Richard A. Harvey, Esq., of Tustin, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. International Brotherhood of Electrical Workers, Local Union No. 441, AFL–CIO (Union or IBEW Local 441), filed unfair labor practice charges (captioned as CA cases) against Harbor Crest Electrical, Inc. (Respondent) on May 10 and August 2, 1990.[1] Both charges were amended on August 13.

On September 28, the Regional Director for Region 21 of the National Labor Relations Board (NLRB or the Board) issued a consolidated complaint (complaint) alleging Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The complaint contains a notice of hearing before an administrative law judge.

On October 12, the NLRB Regional Director for 21 issued a report on objections and order directing hearing and order consolidating cases and notice of hearing in Case 21–RC–18696. The report concerns the Union's objections to an election conducted in that case on August 2 and finds that the issues raised by the Union's objections are ''the same as, or closely related to, the issues involved in [the unfair labor practice cases].''

Respondent answered the complaint on October 8 denying that it engaged in the unfair labor practices alleged.

I heard this matter on January 29 and 30, 1991, at Los Angeles, California. After carefully considering the record, the demeanor of the witnesses, and the posthearing briefs filed by the General Counsel and Respondent, I find Respondent engaged in certain unfair labor practices alleged based on the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONS

A. *The Pleadings*

1. The complaint allegations

The complaint alleges Respondent discharged employees Scott Westerlund and Glen DeSoto on May 7 and June 22, respectively, because of their union or other protected concerted activities in violation of Section 8(a)(1) and (3). The complaint also alleges that Respondent independently violated Section 8(a)(1) by: (1) polling its employees concerning their union preferences; (2) creating the impression that employee union activity was under surveillance; (3) threatening reprisals against employee union activity; and (4) interrogating employees about their union activities. The complaint further alleges that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union on or after May 7. As of that date, the complaint asserts, a majority of employees in an appropriate unit had executed authorizations designating the Union as their bargaining representative and, as Respondent's unfair labor practices are so substantial and serious as to preclude a fair election, employee sentiment regarding representation as expressed by the authorization cards would, on balance, be best protected by issuance of a bargaining order.

At the conclusion of the General Counsel's case-in-chief, Respondent moved for dismissal of the complaint for want of proof. Following argument, that motion was granted as to the surveillance and polling allegations only.

The surveillance allegation is predicated on the same evidence offered in support of the coercive interrogation allegations. That evidence, viewed in a light most favorable to the General Counsel, reflects classic employer interrogation to obtain information concerning employee union activity and sentiment. For this reason, the surveillance allegation was deemed redundant as any remedial order related to the inter-

[1] All dates refer to the 1990 calendar year unless otherwise indicated.

rogation allegations would be designed to deter the type of conduct at issue.[2]

No showing was made during the General Counsel's direct case which could be construed as evidence of unlawful polling other than evidence that two employees were interrogated and some muddled testimony about an employee meeting at the Respondent's office in July. During argument, the General Counsel expressed an intention to further support this allegation during Respondent's case or on rebuttal with a letter from attorney Harvey purportedly containing an admission of Respondent's polling conduct. However, I concluded that the polling allegation stood unsupported in the face of Respondent's pending motion to dismiss and, hence, I granted Respondent's motion as to the polling allegation also.

Thereafter, the General Counsel was permitted to make an offer of proof concerning the polling allegation and the Harvey letter was received as a rejected exhibit. The General Counsel's brief argues that a finding of unlawful polling is warranted. To the extent that the General Counsel seeks reconsideration of the polling issue, it is denied.[3]

For the foregoing reasons, the surveillance and polling allegations are not treated further in this decision.

2. The election objections

The Regional Director's report on objections reflects that a secret ballot election was conducted on August 2 pursuant to a Stipulated Election Agreement approved on July 13 in the following bargaining unit:

> All electricians employed by the Employer at its facility located at 14831 Myford Road, Suite A, Tustin, California; excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

The tally of ballots served immediately following the election reflects that, of the eight eligible voters, six ballots were cast against the Union, no ballots were cast for the Union, and two ballots were challenged. The Union filed timely objections.

Union Objections 1 and 2 allege that Respondent interrogated and threatened employees, and discharged two employees.

The Regional Director's report on objections finds that because Union Objections 1 and 2 are the same as, or closely related to, the allegations in the unfair labor practice complaint, those issues ''can best be resolved after a hearing in conjunction with the allegations of [the unfair labor practice complaint].''

B. *The Evidence*

1. Jurisdiction

Respondent, a California corporation, is engaged in electrical contracting from its office and place of business in Tustin, California. It commenced operations on approximately March 1.

Respondent denied the jurisdictional allegations of the complaint. Those allegations track the jurisdiction stipulation contained in the Stipulated Election Agreement of Case 21–RC–18696 executed on July 12 by attorney Harvey in his capacity as Respondent's vice president. Essentially, that stipulation provides that between the date Respondent commenced operations and July 12, it

> purchased and received goods, supplies or materials valued in excess of $25,000, which were shipped directly to [its] facility, from suppliers located in the State of California [who], in turn, received such goods[,] supplies or materials directly from points located outside the State of California. If projected through the [Respondent's] first 12 months of operations, the purchased and received goods, supplies or materials described above will be valued in excess of $50,000.

Notwithstanding Respondent's denial of the complaint's jurisdictional allegations, I refused to permit the litigation of that matter in this consolidated proceeding. See, e.g., *Academy of Art College*, 241 NLRB 454, 455 (1979). Based on the representation case stipulation, I find that Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act. I further find that it would effectuate the purposes of the Act for the Board to exercise its jurisdiction to resolve this labor dispute.

2. Background

Rod Chamberlain is Respondent's president. Chamberlain either owned or was affiliated in a management position with two other companies—C & R Electric and C & R Construction—engaged in electrical contracting over the past decade. C & R Electric was a union contractor; C & R Construction was nonunion. Both of those companies are no longer doing business.

Ken Loomer worked primarily in Respondent's office as a salaried estimator and materials procurer. As noted below, Loomer interviewed and hired some of Respondent's electricians. Respondent's electricians were directly supervised by Field Foreman Robert Haugen, an individual employed off and on over the years in a similar capacity with both C & R Electric and C & R Construction.[4]

[2] Having now concluded that a broad cease-and-desist order is appropriate in this case, I further find that any separate order pertaining to surveilance is unnecessary.

[3] The General Counsel's brief argues that no prejudice would have occurred by allowing the General Counsel to reopen its case-in-chief to provide an opportunity to introduce the letter in view of Respondent's motion to dismiss. I strongly disagree. The motion to dismiss at the announced conclusion of the case by a party bearing the burden of proof for the allegations underlying the action is common practice and is designed to winnow out those matters demanding a response from those which do not. If the General Counsel's argument that no prejudice would occur by allowing the introduction of proof which should have been forthcoming in the first place is adopted, Respondent's due process right to make such a motion in a timely manner is rendered practically useless.

[4] Based on evidence showing that Loomer hired certain electricians, I find that he was a supervisor within the meaning of Sec. 2(11) of the Act. I also find Haugen was a statutory supervisor. He was the only individual who regularly supervised the electricians in the field. He assigned employees to various projects, told employees what work to do, checked the work when completed, ordered changes in completed work, kept time records, resolved grievances,

Haugen, previously a member of IBEW Local 11 in Los Angeles County, described his relationship with Chamberlain over the years as one of friendship. During his employment with C & R Construction, Haugen apparently let his union membership lapse. Eventually that company ceased providing medical insurance and, in time, the lack of medical insurance became a personal problem for Haugen. For this reason, he urged Chamberlain to become a union signatory contractor again. Chamberlain rejected that suggestion. According to Haugen, Chamberlain explained that such action would cause him to go broke and be out of business in 6 months.

Thereafter—and within a very short period after he began receiving pay on Respondent's checks—Haugen advised Chamberlain of his intent to leave Respondent's employ in 30 days to renew his IBEW Local 11 membership and secure work through its hiring hall. Faced with this development, Chamberlain instructed Loomer to advertise for electricians in a local newspaper and hire a potential replacement for Haugen.

3. The organizing effort

Steve Nelson, an electrician by trade, is a longtime member of IBEW Local 441 in Orange County. For certain periods between April 1988 and September 1990, Nelson was employed on the staff of Local 441 as an organizer. The most recent period of such employment was from March to September 1990.

In late March or early April, Nelson read Respondent's newspaper advertisement for electricians. Because he was unfamiliar with the telephone number listed in the ad, he called the number to obtain information about the company. Among other things, Nelson learned that Respondent regularly performed ''prevailing wage'' work, a fact which suggested organizing potential to Nelson.

Subsequently, Nelson encouraged Steve Westerlund, also a longtime IBEW Local 441 member to apply for employment with Respondent. Westerlund did so and was hired by Loomer following a personal interview. Loomer told Westerlund that Respondent was seeking an electrician with the potential to replace Foreman Haugen. At or about the same time, Loomer also hired Mike Ferraro as an electrician and told him the same thing.

Once employed, Westerlund communicated frequently, if not daily, with Nelson about unionizing Respondent.[5]

In late April, Nelson conducted a meeting for Respondent's employees at the union hall after their workday ended. Westerlund, Ferraro, and Glen DeSoto, another of Respondent's electricians, attended. Haugen too may have attended. During this meeting Nelson explained perceived advantages of union membership, explained the organizing process, and otherwise sought to determine employee interest in unionization. Although Nelson distributed union authorization cards at this time, he asked the employees to mail the completed cards back to him after considering the matter. Following the meeting, Nelson maintained contact with the employees by telephone.

On the morning of May 7, Nelson visited DeSoto and another electrician, Alan Lambert, at their jobsite in Costa Mesa. Nelson explained that he wanted to move forward with organizing Respondent's employees and asked that they each sign an authorization card. DeSoto did so but Lambert declined. Nelson told the two employees that he intended to file an NLRB election petition and then speak with Chamberlain about changes in working conditions.

Later that same morning, Nelson visited Ferraro and Westerlund at their jobsite on the Bella Vista School project in Montebello. Nelson told those two employees of his plans—essentially as described earlier to DeSoto and Lambert. Both Ferraro and Westerlund signed cards. Nelson also located Haugen in an adjacent building, explained what he was doing, and asked for Haugen's support. Haugen too signed an authorization card.

Nelson then went to the NLRB Region 21 office in Los Angeles where he filed an election petition. After leaving the NLRB office, Nelson returned to the union office in Santa Ana briefly and then went to Respondent's office in Tustin accompanied by an new union organizer, Mike Achabie. Nelson estimated that he arrived at Respondent's office between 3 and 4 p.m.

Chamberlain greeted the union agents in the reception area at Respondent's office. There, Nelson advised Chamberlain that a majority of Respondent's employees had signed union authorization cards and that he had filed an NLRB election petition. Nelson added that ''it was time for [Chamberlain] to come back and become a signatory contractor again.''

Chamberlain responded to this news by asking who ''turned me into the Union.'' When Nelson declined to say, Chamberlain asked if it was DeSoto, an employee who had been—as Chamberlain was aware—an apprentice at IBEW Local 441 in the early 1980's. Nelson assured him that it was not DeSoto and added that he was ''not going to get into a process of elimination.'' Nevertheless, Chamberlain continued to press Nelson for an identity and Nelson finally said, ''Certainly you understand Scott Westerlund was one of our members.'' Chamberlain appeared surprised to Nelson but did not say anything.

Nelson's exchange with Chamberlain ended after agreement was reached to meet and discuss the matter further at 9 a.m. on May 9.

On May 7, Respondent's nonsupervisory employees were Chamberlain's sons, Jeff and Tim, DeSoto, Ferraro, Lambert, and Westerlund. The latter four employees were all full-time journeymen electricians.

Jeff Chamberlain was a high school student at the time. On the average he worked 10 to 12 hours per week during the school year and longer periods during the summer vacation months when employed by C & R Construction. There is no evidence that Jeff Chamberlain worked as an electrician. His rate of pay was less than half that of the journeymen.

Tim Chamberlain was a part-time college student. During the school year he worked between 30 and 40 hours per week. He was allowed to take time off to attend college classes as scheduled. Rod Chamberlain asserted that his son

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and made effective recommendations concerning a full range of personnel actions. Haugen's recommendation, for example, that Mike Ferraro be promoted foreman when he left appears to have been followed with little or no independent investigation by higher management.

[5] Obviously, Nelson planned to obtain more detailed information through Westerlund following his employment. For this reason, Nelson instructed Westerlund to disguise his union membership during the application process. However, no evidence shows that Westerlund was ever a paid union staff member or official.

Tim performed electrical work and characterized his status as one of an on-the-job trainee. His hourly pay rate was approximately two-thirds to three-fourth the hourly rate earned by the journeymen electricians.

According to Foreman Haugen, Tim Haugen spent at least 50 percent of his time working in Respondent's office but would, on occasion, work in the field as a helper or performing minor electrical work. However, the latter work was limited, Haugen said, because of Tim's inexperience and lack of training. Haugen estimated that Tim Chamberlain worked on a field project perhaps 1 or 2 days every 2 weeks.

4. The alleged interference, restraint, and coercion

With the exception of DeSoto's discharge, the remaining matters alleged in the complaint occurred following the May 7 conversation between Chamberlain and Nelson and in the next few days. Although there is some agreement about a few events, for the most part the witnesses provided divergent accounts.

DeSoto claims that Chamberlain came to the jobsite in Costa Mesa between 4 and 5 p.m. on May 7 where he was working with Lambert.[6] Chamberlain asked DeSoto and Lambert who ''turned me into the Union.'' Chamberlain pressed the matter when neither responded. DeSoto asserted that Chamberlain said that he'd ''like to find out because Scott Westerlund is from the Union.'' Chamberlain also told DeSoto and Lambert that ''[i]t looks like I'm going to have to fire everyone and start all over.'' In the course of the the discussion, DeSoto said Jim Dingwell's name came up and by the end of the discussion DeSoto felt that Chamberlain believed Dingwell had alerted the Union.[7]

A couple of days later (which would have been May 9), DeSoto said that Chamberlain came to Respondent's Laguna Beach job where he was again working with Lambert. On this occasion Chamberlain approached the two men and asked if they had signed union authorization cards. According to DeSoto, the question appeared to be directed more to Lambert who denied having done so; DeSoto said he did not respond. By DeSoto's account, Chamberlain also mentioned that he was scheduled to meet with Nelson that day.

Lambert recalled that Chamberlain had asked DeSoto and himself ''if we informed the Union about something.'' Lambert said that this occurred at the Costa Mesa job and, although he was not certain, he believed the inquiry was made a few days before Nelson approached them at that job about signing authorization cards. Lambert could not recall any further discussion about the Union on this occasion.

Lambert also said that Chamberlain asked him whether he had signed a union authorization card on another occasion. Lambert was not certain when this occurred but, he said, it might have been at a meeting in Respondent's office.

Lambert denied that Chamberlain ever discussed the Union while DeSoto and he were working on the Laguna Beach job. Lambert also denied hearing Chamberlain state, either at the Costa Mesa job or during a meeting at Respondent's office, that he was going to fire everyone and start over.

Chamberlain admitted that he asked DeSoto and Lambert who had turned him into the Union on the morning of May 8 at the Costa Mesa job. Although phrased as a question, Chamberlain said that it was really a remark made in jest to the two men. Both men, Chamberlain said, laughed and said that they had not done so. Chamberlain claims there was no further conversation at that time about the Union. He specifically denied saying, then or at any other time, that Respondent would have to start over if they joined a union. He also denied that he otherwise threatened DeSoto.

Chamberlain was at the Laguna Beach job in the morning of May 9.[8] He said that he went there for the purpose of meeting with an inspector and the job superintendent. He claims that he did not see DeSoto or meet with any of Respondent's employees while there. Chamberlain denied that he interrogated any employee on May 9 at Laguna Beach about signing a union card, about their union membership, or about how they would vote in an election if held.

5. Scott Westerlund's termination

In the meantime, on May 8 Chamberlain telephoned Foreman Haugen at the Bella Vista school job around noontime to advise that he was coming to the job that afternoon. Chamberlain asked Haugen to keep the employees there until he arrived. Based on his prior dealings with Chamberlain, Haugen anticipated that a layoff was coming.

When Chamberlain arrived he gave Haugen an envelope and told him that it was Westerlund's layoff check. Haugen then went to Westerlund's work location and spoke to him for a few minutes. When Haugen handed Westerlund the check, he said he told him, ''I think you were expecting this.'' According to Haugen, Westerlund said, ''We both know why I got this,'' or words to that effect. Haugen said he just shrugged his shoulders.

Westerlund's version varies somewhat. He said that Haugen remarked, ''We both know what this is for,'' when handing over the pay envelope. Westerlund then asked Haugen why he was being laid off. Haugen purportedly stated that ''[t]he official reason was reduction in force'' but repeated that they both knew what it was for.

That same day, but following Westerlund's termination, Chamberlain remarked to Haugen that ''somebody in our ranks [is] promoting unionism.'' Haugen told Chamberlain that he was not doing it and he did not know who was.

The following day Respondent hired electrician Robert Bellavance who worked for Respondent until December 11.

Both Chamberlain and Loomer denied that Westerlund was laid off because of his union activity. Chamberlain also denied that he knew Westerlund had signed a union authorization card before the layoff but did not specifically deny Nelson's claim that Chamberlain had been told (by Nelson) that Westerlund was ''one of our members.''

[6] This jobsite was at the residence of an individual named Moe Quirk. Chamberlain said that while working on that job, DeSoto and Lambert were actually employed by Quirk rather than Respondent which was merely providing materials for the job. Contrary to Respondent's argument, I find that temporary employment is of no significance to the issues here.

[7] Dingwell worked for Respondent as an electrician from April 4 to 18.

[8] Apparently, Chamberlain was delayed at this job that morning and missed his scheduled meeting with Nelson. Nelson said that he waited for a period of time at Respondent's office. After Chamberlain failed to appear, Nelson left various telephone numbers with Loomer and a message for Chamberlain to call. Chamberlain failed to do so. Hence, the two never met as planned on May 9 or anytime thereafter until the date of the hearing in the NLRB election case.

As noted, Haugen recommended Ferraro's elevation to the foreman position he was about to vacate.[9] Chamberlain explained that when the decision was made to select Ferraro as foreman, Respondent did not need an additional employee ''and Mr. [Westerlund] was then let go.''[10] Chamberlain also claimed that Haugen had reported that Westerlund's work as an electrician was not ''up to standard.''

Chamberlain said that he promoted Ferraro to the foreman position even though Haugen told him that Ferraro had signed a union authorization card. This knowledge was acquired, Chamberlain claimed, on Haugen's last day of employment. Haugen emphatically denied that he told Chamberlain the name of any employee who signed an authorization card.

Both Chamberlain and Loomer claimed that Dick Giles, the general contractor's job superintendent on the Orange County Water District job, had telephoned to complain about some conduit installation work performed by Westerlund on that job. Chamberlain said that Giles did not want Westerlund back on the job but there is no evidence that Westerlund was ever actually removed from any job because of complaints by agents of a general contractor.

Haugen, who directly supervised Westerlund throughout his employment with Respondent, felt that, of the two, Ferraro would project a better image for Respondent in the field, especially when dealing with representatives of general contractors as regularly required. Westerlund, Haugen explained, was overweight, and suffered from a disturbing and uncontrollable ptyalism condition which he had discussed with Westerlund. Chamberlain, who had never seen Westerlund until immediately following his layoff, apparently alluded to this latter condition when he described Westerlund as ''not a very clean person.''

However, Haugen claimed that those conditions which made Westerlund unsuitable as a foreman did not detract from his work as a journeyman electrician. Haugen said that Westerlund was slow but that he was a competent journeyman whose work could be trusted and that he had never complained to Chamberlain or Loomer about Westerlund's work.[11]

Haugen recalled one occasion on the Water District job when Westerlund installed some conduit which had to be removed and reinstalled. However, Haugen explained that he had laid out that work for Westerlund who then followed his instructions precisely. Although installed correctly and as directed, Haugen said the work did not look good and that neither he nor Giles liked it so Haugen removed it and reinstalled the conduit in a manner which would be more pleasing aesthetically.

Haugen claimed that this matter involved less than an hour's work and otherwise diminished its overall importance. Thus, although Haugen said that he could have mentioned the matter to Loomer in passing, it was not of such significance that he would have reported it to Loomer or Chamberlain as an example of poor workmanship.

Loomer, on the other hand, claimed that Giles (who was not called as a witness) was very upset because Westerlund had drilled holes in a metal building which, potentially, could later leak. Loomer said that ''theoretically'' the general contractor could have back charged Respondent for repairs occasioned by the work and that he visited the job to inspect the damage.

6. The failure to recall Glen DeSoto

DeSoto worked off and on for Chamberlain affiliated operations since 1987. Most recently, he was called to work at Harvey Construction and then in April he began receiving checks from Respondent while employed on the same projects. He worked on a regular basis until June 21.

On June 21, DeSoto completed an assignment in Palm Desert and telephoned Loomer for another assignment. Loomer told him to report to the Bella Vista School job the following morning.

En route to that job on the morning of June 22, DeSoto's truck broke down. After arranging to have the vehicle towed, DeSoto telephoned Loomer again to report his predicament.

Loomer apologized for not contacting DeSoto earlier to alert him that the Bella Vista work was minor and had been completed by Ferraro. Loomer also advised that as work was slow, he did not anticipate a further assignment for DeSoto until after the July 4 holiday. Based on this information, DeSoto told Loomer he planned to visit his father out of State.

Additionally, Loomer asked that DeSoto return a company ladder to the Orange County Water District job. When DeSoto complied, he found Bellavance working on that project, a circumstance which disturbed DeSoto because of his seniority relative to Bellavance.

On Monday, June 25, DeSoto said that he telephoned Loomer to advise that he would not be going to visit with his father and asked if work was still slow. Loomer confirmed that was the case and again added that further work was unlikely until after July 4.

At some point, DeSoto registered on the Union's out-of-work list. On Wednesday, June 27, he was referred to work with another electrical contractor by the Union. However, because he earned more money working for Respondent than he did for his new employer, DeSoto continued his interest in work opportunities with Respondent. This same day, Eric Bessem commenced work for Respondent as an electrician and continued his employment until December 11.

On June 28 or 29, DeSoto again telephoned Loomer to explore potential work with Respondent. Loomer continued to assure DeSoto that no work would be available until after the July 4 holiday.

On July 5, Loomer telephoned DeSoto to let him know that his check was ready. DeSoto went to the Respondent's office to collect his pay and spoke to Loomer for about an hour. Loomer told DeSoto that there was not ''a lot of work going on right now.'' DeSoto told Loomer during this lengthy conversation that he had a job ''for right now.'' Although Loomer never specifically told DeSoto on this occasion that he would be called back to work by Respondent,

[9] Haugen's final day in Respondent's employ was May 9, the day following Westerlund's termination.

[10] Throughout Tr. vol. II, Westerlund's name is incorrectly spelled Westerman. The transcript is corrected to reflect the proper spelling. Other minor errors also appear throughout but the meaning is obvious.

[11] Haugen said, however, that he warned Westerlund to quit talking so much to other jobsite employees or find another place to work during Westerlund's first week on the job. Westerlund apparently corrected this practice. Haugen said that he may have mentioned that fact to Loomer at the time.

DeSoto assumed that he would when the work picked up. In fact, DeSoto was never recalled to work with Respondent.

By his account, Loomer was responsible for the failure to recall DeSoto. Loomer did not think that he discussed DeSoto's recall with Chamberlain and specifically denied that he discussed that matter with attorney Harvey. He also denied that union considerations had anything to do with the failure to recall DeSoto.

Instead, Loomer said that DeSoto had complained about not getting enough work hours to earn wages sufficient to pay his bills toward the end of his employment. When DeSoto finished his last assignment, Loomer claimed that no further work was available. At that time, Loomer told DeSoto that one big job (Laguna Beach) was coming up and it would ''not only mean the crew we had but would probably have to have one or two extra guys when it started rolling.''

When Loomer told DeSoto that there would be no work ''in the next couple, three or four days,'' DeSoto said that he was going to ''take a little vacation and go visit his dad or do something.'' DeSoto, Loomer said, promised to call back when he returned to town.

According to Loomer, ''[t]he following week when [DeSoto] got back in town he called me and asked if I had any work for him.'' Loomer said that he did not. Loomer also told DeSoto that the ''new job'' was supposed to start up ''within a couple of weeks.'' Up to this point, Loomer said, he still intended to recall DeSoto.

Loomer said that DeSoto called again a day or two later to ask if the ''new'' job had begun. After Loomer reported that it had not, DeSoto told Loomer that he had a job offer from Sasco Electric which he intended to accept.

Loomer ''didn't think'' he recalled DeSoto when work picked up. The ''biggest reason,'' Loomer said, was his belief that if DeSoto was working for Sasco—one of the country's largest electrical contractors—he (Loomer) did not think that he could offer anything to entice DeSoto back.

C. *Further Findings and Conclusions*

1. Witness credibility

In reaching my conclusions detailed below, I have given considerable weight to the testimony of former foreman Haugen and Glen DeSoto. Where the testimony of Chamberlain, Loomer, Lambert, and Ferraro is conflicting, the accounts by Haugen and DeSoto are credited. Lambert and Ferraro impressed me as being unusually evasive while testifying about critical issues and, as seen below, the explanations of Chamberlain and Loomer for the two employee terminations involved here simply fail to respond to the issue.

By contrast, Haugen impressed me as an individual attempting to be forthright and candid albeit he was obviously pained by his presence at the hearing. Moreover, I found the degree of his recollection to be reasonable under the circumstances.

The balance in Haugen's testimony also suggests that he had no conscious bias for the central players in this dispute. Thus, on the one hand he readily admitted that he very well may have told Loomer about the unsightly conduit incident and Westerlund's early penchant to bother other employees with an undue amount of nonwork conversation. On the other hand, he steadfastly denied that he ever told Chamberlain that Ferraro signed a union authorization card.

Notwithstanding his departure from Respondent's employ to return to a union work environment, I am convinced that Haugen's testimony is not colored by an extreme union ideology. He appears to have forthrightly apprised Chamberlain of his reasons for leaving and nothing in his testimony suggests a transparent embellishment to aid one side or the other. To conclude that Haugen's motive for testifying was to assist the Union's case requires one to assume that he was either remarkably subtle for a layman or poorly prepared to aid a cause. I find such a conclusion unsupportable.

DeSoto's testimony is more problematic on the surface. Undoubtedly, his testimony can be viewed as inconsistent with respect to two critical statements purportedly made by Chamberlain at Costa Mesa on May 7—or May 8 by Chamberlain's account. The question presented is whether his inconsistency resulted from mere forgetfulness or whether it signals a lack of reliability on his part as Respondent argues.

The testimony giving rise to the problem discussed here is DeSoto's assertions that Chamberlain alluded to closing the shop and starting all over again in the context of other remarks about the Union, and Chamberlain's reference to Westerlund's union membership. The former directly supports a complaint allegation; the latter tends to corroborate Nelson's claim that he told Chamberlain about Westerlund's membership during their May 7 conversation.

Before any reference to the two statements arose during his direct examination, DeSoto responded in the negative to counsel's question, ''Did he [Chamberlain] say anything else about the Union?'' Counsel then sought to refresh DeSoto's recollection with his prehearing affidavit. That was not permitted because DeSoto's clear negative answer gave no indication of a failed recollection.

Counsel was permitted, however, to establish that DeSoto had made a prior statement inconsistent with his negative answer to the quoted question. Thus, when asked if he had previously stated (in his prehearing affidavit) that Chamberlain had made the shop closing statement and mentioned Westerlund's union membership in the same conversation, DeSoto promptly and unequivocally admitted that he had made such a prior statement. Counsel then sought to introduce the prehearing affidavit which was rejected as unnecessary because DeSoto had admitted making the prior inconsistent statement. The matter was then dropped. In this posture, no substantive evidence of such statements by Chamberlain existed.[12]

However, on direct examination by the Union, DeSoto was questioned and testified specifically about the shop-closing statement. During cross-examination, DeSoto again testified about that particular statement to the apparent surprise of Respondent's counsel.[13]

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[12] A prehearing NLRB affidavit used only for impeachment purposes is hearsay under the Fed.R.Evid. 801(d)(1)(A). *NLRB v. McClure Associates*, 556 F.2d 725 (4th Cir. 1977).

[13] DeSoto's testimony at that time reads:

> Q. Were you ever threatened with being fired if you joined the Union?
>
> A. Yes.
>
> Q. Oh, when?
>
> A. On the original date that he [Chamberlain] came in, when we signed our authorization cards, Moe Quirk job.

From the circumstances summarized above and my observation of DeSoto while testifying, I have concluded that he momentarily failed to recollect these added statements by Chamberlain and that the described inconsistency does not impugn his testimony generally.

Moreover, as DeSoto acknowledged that he had made a prior statement (the prehearing affidavit) asserting that Chamberlain had made both the shopclosing statement and the Westerlund union membership remark during the same conversation, and subsequently provided substantive testimony with respect to the shopclosing statement, I have treated the Westerlund union membership remark as substantive evidence for the purpose of the findings made below.

Both Lambert and Ferraro impressed me as highly evasive witnesses on crucial matters in this case. Lambert's effort at the hearing to suggest that an attempt was made to put words in his mouth in the course of taking his prehearing affidavit was particularly disingenuous. Other evidence reflects that Lambert can, if he chooses, stand by his convictions. He did, after all, refuse to sign a union authorization card despite what he perceived as pressure to do so.

Respondent further argues that Westerlund's testimony—even though ''nonsubstantive in relation to the [complaint] allegations''—should be viewed skeptically because of his long association with the Union. That fact has been taken into account. Westerlund's recollection of when and where he signed his union authorization card is obviously in error as it was date stamped at the NLRB Regional Office on May 7, some 2 hours before the time fixed in his testimony. On this latter point, Nelson's testimony is credited.

2. Allegations of interference, restraint, and coercion

Section 8(a)(1) of the Act prohibits employer interference, restraint, and coercion of employees who exercise their Section 7 rights to form, join, or assist a labor organization, or to refrain from engaging in such activity. Managers or supervisors who coercively interrogate employees concerning union activity or who threaten a cessation of business to discourage such activity violate this prohibition. *Kona 60 Minute Photo*, 277 NLRB 867 (1985); *Atlas Microfilming*, 267 NLRB 682 fn. 2 (1983).

I find Chamberlain coercively interrogated DeSoto and Lambert by asking them who ''turned me into the Union'' on May 7 or 8 at the Costa Mesa job. All three agree the question was propounded. I do not credit Chamberlain's claim that the words were really a statement made in jest. Neither DeSoto nor Lambert supported that claim. Moreover, Nelson's uncontradicted testimony that the same words were propounded to him during their May 7 meeting strongly support the conclusion I have reached that Chamberlain was making an effort to identify any individual responsible for initiating the union effort. As I have concluded below that Chamberlain threatened to close his shop in the course of the same encounter, the coercive character of Chamberlain's question seems unquestionable.

Similarly, I credit DeSoto's testimony that Chamberlain threatened to close the shop and start over again in the course of this same conversation at Costa Mesa on May 7. Although Chamberlain denied ever making such a remark, I am satisfied that DeSoto's account should be credited. His recollection of this statement on cross-examination as an example of a threat made to him because of the union activity appeared candid and truthful. On the basis of this statement, I find that Chamberlain threatened to close the shop and start over again to thwart the employee union activity.

Both DeSoto and Lambert said that Chamberlain also questioned them about whether they had signed a union authorization card but Lambert could not recall when or where this occurred with any degree of certainty. DeSoto, by contrast, recalled that it occurred at the Laguna Beach job on May 9 and that in the course of the same conversation, Chamberlain mentioned that he had a meeting scheduled that day with Nelson, a fact which was true at the time. Chamberlain denied that he spoke to any employee on that occasion. I am satisfied that DeSoto's recollection of the incident is the more reliable and I credit him on this point. I find this question was also coercive as it closely followed other unlawful remarks and an unlawful discharge.

By the conduct detailed above, I find Respondent violated Section 8(a)(1) of the Act as alleged.

3. The discrimination allegations

a. *Legal principles*

Section 8(a)(3) of the Act makes it unlawful for an employer to discriminate against its employees to encourage or discourage membership in a labor organization. The following principles, restated by the Board in *Hunter Douglas, Inc*., 277 NLRB 1179 (1985), govern the evaluation of evidence in discrimination cases under the Act:

> The Board held in *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied. 455 U.S. 989, that once the General Counsel makes a prima facie showing that protected conduct was a motivating factor in an employer's action against an employee, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must ''persuade'' that the action would have taken place absent the protected conduct ''by a preponderance of the evidence,'' *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). If an employer fails to satisfy its burden of persuasion, a violation of the Act may be found. *Bronco Wine Co*., 256 NLRB 53 (1981).

b. *Westerlund*

In my judgment, General Counsel established a strong prima facie case with respect to Westerlund's termination. In sum, that case shows that Westerlund was active in promoting the organizational effort and signed a union card. When Chamberlain learned that the Union was seeking recognition, he learned from Nelson that Westerlund was a union member and later the same day unlawfully questioned two other employees and threatened to close the shop. The following day, Chamberlain terminated Westerlund for reasons not specified to either Foreman Haugen or Westerlund and hired a new electrician the following day.

Q. Okay. And you've already testified to that conversation?
A. Yes.

Chamberlain's claim that Respondent had no further need to employ Westerlund after it was decided to select Ferraro to replace Haugen begs the question especially where, as here, another electrician was hired the following day. Up to that point, of course, Westerlund had only worked as a journeyman electrician. Chamberlain's vague claim that Westerlund did not meet journeyman standards has a particularly hollow ring in light of his unfamiliarity with Westerlund and Haugen's generally favorable view of Westerlund's work. The fact that Haugen could only shrug his shoulders when Westerlund suggested they both knew the real reason for his discharge strongly indicates that even Haugen knew something was amiss.

Moreover, Respondent's effort to demonstrate the lack of a discriminatory motive by showing that it promoted Ferraro even with knowledge that he signed a union card is, in my judgment, not truthful. Contrary to Chamberlain's testimony, I find that Haugen did not tell Chamberlain that Ferraro had signed a union card as Chamberlain claimed.

Loomer's effort to paint Westerlund as a poor worker so disliked by the general contractor's superintendent at the Water District job is equally unconvincing. Haugen made it clear that Giles' dislike of Westerlund was unrelated to his work and that the responsibility for the aesthetic error on that job by Westerlund really rested with his layout of the job and not Westerlund's installation. The fact that Respondent took no action against Westerlund as supposedly requested by Giles and the failure to call Giles as a witness to support this serious claim leads me to conclude that Loomer's account is not truthful.

In these circumstances, I find Respondent's evidence designed to establish that Westerlund would have been terminated on May 8 even in the absence of his union activity is unpersuasive. Accordingly, I find that Westerlund's termination violated Section 8(a)(1) and (3) of the Act as alleged.

c. *DeSoto*

I have concluded that the General Counsel also met the burden imposed by *Wright Line* in DeSoto's case. Thus, the uncontradicted evidence reflects that Chamberlain was familiar with DeSoto's past involvement with IBEW Local 441 and, on learning of the current organizing drive, Chamberlain immediately suspected DeSoto's involvement as is evident in his remarks to Nelson during their May 7 exchange. This suspicion on Chamberlain's part is also strongly suggested by the fact that he questioned DeSoto twice about the union activities over the course of the 2 days after May 7.

In late June, Respondent simply ceased assigning DeSoto further work. Although DeSoto was told Respondent had no further work because business happened to be slow, that explanation is entirely at odds with the concurrent hiring of Bessem.

Loomer's explanation of Respondent's failure to recall DeSoto, i.e., DeSoto was already employed by another large contractor, fails to explain its hiring of Bessem while DeSoto was being told that no work was available. In these circumstances, I find that Respondent's belief—whether known or suspected—that DeSoto was involved in the organizing effort provides the only plausible explanation from this record for its failure to give DeSoto further assignments after June 21.

For the foregoing reasons, I conclude that Respondent has failed to provide persuasive evidence to show that DeSoto would have received no further assignments after June 21 even in the absence of his union activity. Accordingly, I find that Respondent discriminated against DeSoto in violation of Section 8(a)(1) and (3) of the Act as alleged.

4. The election objections

Objectionable conduct occurring between the date of the filing of an NLRB election petition and the date of the election itself may be considered in assessing whether or not an election should be set aside. *Red's Novelty Co*., 222 NLRB 899 (1976). Section 8(a)(1) and (3) unfair labor practices are treated as objectionable conduct which, a fortiori, interferes with the exercise of a free and untrammeled choice in an NLRB election sufficient to warrant setting aside an election outcome. *Dal-Tex Optical Co*., 137 NLRB 1782, 1786 (1962); *Bama Co*., 145 NLRB 1141, 1144 (1964).

Having found that Respondent violated Section 8(a)(1) and (3) of the Act between May 7—the date the election petition was filed—and August 2—the date the election was held—I conclude that Union Objections 1 and 2 are meritorious. Accordingly, I will recommend that the election be set aside and, in view of the finding below that the chances for a fair rerun election are slight, that the election petition be dismissed.

5. The refusal-to-bargain conduct

Section 8(a)(5) prohibits an employer from refusing to bargain with a representative selected by a majority of its employees in an appropriate unit.

A Board bargaining order may be based on evidence of a union's majority status in the form of authorization executed by a majority of the unit employees with or without a bargaining demand in ''exceptional'' cases marked by ''outrageous'' and ''pervasive'' unfair labor practices. Similarly, the Board may require recognition and bargaining ''in less extraordinary cases marked by less pervasive practices which nonetheless still have a tendency to undermine the [union's] majority strength and impede the election processes,'' notwithstanding that the preferred means under the Act for ascertaining employee sentiment concerning union representation is the election process. *NLRB v. Gissel Packing Co*., 395 U.S. 575, 613–615 (1969). However, absent a demand to bargain in an appropriate unit, the Board does not find, as I do here, a violation of Section 8(a)(5). See, e.g., *Color Tech Corp*., 286 NLRB 476 (1987). Bargaining orders issued in cases without the ''demand'' predicate are designed to remedy other unfair labor practices.

The General Counsel believes this is one of the ''less extraordinary cases marked by less pervasive practices'' which nonetheless warrants finding that Respondent unlawfully refused to recognize and bargain with the Union on May 7. For this reason, General Counsel asks that Respondent now be ordered to recognize and bargain with the Union notwithstanding the August 2 election results because the chances for a fair rerun election are slight. I agree.

I find that Nelson satisfied the essential elements required to establish such a violation on May 7 during his visit with Chamberlain. By stating to Chamberlain that ''it was time for [Chamberlain] to come back and become a signatory con-

tractor again,'' Nelson unmistakably requested Respondent to recognize and bargain with the Union concerning Respondent's electricians.

Furthermore, as Respondent's electricians comprise essentially all its field employees and as the parties subsequently stipulated that a unit limited to Respondent's electricians is appropriate, I find that unit is appropriate for purposes of collective bargaining under the Act.

The next question for resolution here is whether General Counsel demonstrated the Union's majority standing at the time of Nelson's recognition request even on the basis of its authorization cards. On that issue, the evidence reflects that Respondent employed eight individuals on May 7 when the Union effectively demanded recognition. Of the eight, I have concluded that Loomer and Haugen were supervisors and, hence, they are discounted in determining the Union's majority standing on that date.

Of the remaining six individuals, Jeff Chamberlain—the high school student—does not qualify for placement in this unit. My conclusion is based on Jeff Chamberlain's status as a full-time student and son of the corporate president; the limited number of hours per week he worked and his substantially lower hourly rate of pay compared to Respondent's electricians especially where, as here, Respondent was apparently bound by ''prevailing wage'' regulations on several projects; and the lack of evidence that he performed any work similar to the Respondent's electricians at all, or was in any manner qualified to perform even elementary duties normally expected of an employee in the electrician's trade. As Jeff Chamberlain's status, employment, work schedule, pay, qualifications, and duties varied dramatically from other unit employees, I find that he did not share a sufficient community of interest with Respondent's electricians to warrant inclusion in the unit found appropriate here. Cf. *Linn Gear Co. v. NLRB*, 608 F.2d 791 (9th Cir. 1979).

In view of my conclusion concerning Jeff Chamberlain, I find it unnecessary, for reasons evident below, to resolve the status of Tim Chamberlain here.

Concluding as I have that Loomer, Haugen, and Jeff Chamberlain are not unit employees, Respondent employed, at most, five unit employees on May 7. The General Counsel established that three of those five—DeSoto, Ferraro, and Westerlund—executed union authorization cards which authorize, without qualification, IBEW Local 441 to represent them in collective bargaining. Hence, when the Union requested recognition on May 7, it represented a majority of Respondent's employees in an appropriate unit as evidenced by the authorization cards executed by those three employees.

The Board examines both the severity and the present effects of the unfair labor practices committed in deciding whether a *Gissel* remedy is appropriate. *Quality Aluminum Products*, 278 NLRB 338, 339 (1986). Threats of closure and unlawful employee discharges designed to interfere with an organizational effort are deemed ''hallmark'' violations which strongly support such a remedy. *Somerset Welding & Steel*, 304 NLRB 32 (1991).

Unquestionably, Respondent engaged in flagrant conduct which undermined the Union's majority. Almost immediately, Chamberlain threatened to close the shop, unlawfully discharged Westerlund, and engaged in coercive interrogation designed to identify the sources of union support. Later, Respondent unlawfully ceased assigning work to DeSoto. To fill the void left by the departure of DeSoto and Westerlund, Respondent hired two additional employees. The cumulative effect of such conduct produced, one may reasonably infer, the Union's 6–0 drubbing in the August 2 election.

By terminating two of the three card signers Respondent practically eliminated any hope the Union had for maintaining its majority. Additionally, the unlawful threat to close and the coercive interrogation reached even a third member of this small bargaining unit. Indeed, by quitting time on the day following the Union's request for recognition, only Ferraro—soon to be made field foreman in place of Haugen—and Chamberlain's son, Tim, appear to have been untouched by Respondent's serious, unlawful conduct.

Considering the small size of the unit, the significant number of employees affected by the ''hallmark'' unfair labor practices, the lingering effect unlawful discharges tend to have on all employees, the particular vulnerability of these tradesmen for early layoff and delayed recall when work is slow, and the hiring of replacement employees who might well qualify to vote in a future election under eligibility rules applicable in this industry, I find the possibility of erasing the effects of Respondent's past conduct and of ensuring even a reasonably fair rerun election by use of traditional remedies is extremely slight. For that reason I find that a bargaining order remedy here is appropriate.

Based on the foregoing, I conclude that Respondent violated Section 8(a)(5) of the Act as alleged by failing to recognize and bargain with the Union when requested on May 7. To remedy this violation, Respondent will be required to do so now.

II. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with Respondent's business operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The IBEW Local 441 is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating employees about their activities on behalf of IBEW Local 441 and by threatening to close its shop if employees selected a labor organization to represent them in collective bargaining, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging Scott Westerlund on May 8 and by failing to recall Glen DeSoto for further employment after June 21 in order to discourage their membership in IBEW Local 441, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. By engaging in the unfair labor practices specified in paragraphs 3 and 4, above, Respondent interfered with the conduct of the election in Case 21–RC–18696 designed to provide employees an opportunity to freely and fairly express

their choice concerning the selection of a collective-bargaining repre sentative.

6. By refusing to recognize and bargain with IBEW Local 441 in order to gain time to undermine that labor organization's majority standing among its electrician employees, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act.

7. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, the recommended Order requires Respondent to cease and desist therefrom and to take the following affirmative action designed to effectuate the policies of the Act.

To remedy Westerlund's unlawful discharge and its failure to recall DeSoto, Respondent must immediately offer to reinstate them to their former positions, or if their positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other benefits. Respondent must also make Westerlund and DeSoto whole for the loss of any pay and benefits suffered by reason of the discrimination against them. Backpay, if any, shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Contributions due to any trust fund account on behalf of these two employees shall be determined in accord with *Merryweather Optical Co*., 240 NLRB 1213 (1979).

Respondent must further expunge from any of its records any reference to Westerlund's May 8 discharge and to its failure to recall DeSoto. Thereafter, Respondent must notify Westerlund and DeSoto, in writing, that such action has been taken and that any evidence related to the unlawful discrimination against them will not be considered in any future personnel action affecting them. *Sterling Sugars*, 261 NLRB 472 (1982).

Respondent must also recognize and bargain, on request, with IBEW Local 441 as the exclusive representative of its employees in the unit found appropriate.

In view of my conclusion that Respondent engaged in flagrant unfair labor practices, including a threat to close its operation and the termination of two of five unit employees, which were designed to, and did, destroy the Union's majority support, I find that a broad order enjoining further interference with employee Section 7 rights is warranted. *Hickmott Foods*, 242 NLRB 1357 (1979).

Finally, Respondent must post the notice attached to this decision at its office and any existing jobsites in order to notify employees of the outcome of this matter and their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Harbor Crest Electrical, Inc., Tustin, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting International Brotherhood of Electrical Workers, Local Union No. 441, AFL–CIO (IBEW Local 441) or any other union.

(b) Coercively interrogating any employee about supporting, or engaging in activities on behalf of IBEW Local 441 or any other union.

(c) Threatening to close its shop if employees select IBEW Local 441, or any other union, to represent them in collective bargaining.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Scott Westerlund and Glen DeSoto immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the administrative law judge's decision in this case.

(b) Remove from its files any reference to the unlawful discrimination against Scott Westerlund and Glen DeSoto and notify those in writing that this has been done and that the unlawful discrimination against them will not be used in future personnel actions in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine compliance with all terms of this Order, including the amount of backpay due, the propriety of any employee reinstatement, and the expungement of references to employee discrimination.

(d) Recognize and, on request, bargain with IBEW Local 441 as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All electricians employed by Respondent at its facility located at 14831 Myford Road, Suite A, Tustin, California; excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the Act.

(e) Post at its office in Tustin, California, and at its existing jobsites copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Re-

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

gional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election in Case 21–RC–18696 be set aside and that the petition in that case be dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or discriminate against employees in order to discourage membership in the International Brotherhood of Electrical Workers, Local 441, AFL–CIO (IBEW Local 441), or any other labor organization.

WE WILL NOT coercively question our employees about their union activities or threaten to close our shop to discourage union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain with IBEW Local 441 as the exclusive collective-bargaining representative for a unit comprised of our electrician employees, excluding all other employees, professional employees, office clerical employees, guards and supervisors as defined in the law.

WE WILL immediately offer to reinstate Scott Westerlund and Glen DeSoto to their former positions, pay each of them for wages and benefits he lost as a result of his discharge with interest as provided by law, and notify each in writing that we have expunged any reference to his discharge from our records and will not rely on his discharge in future personnel actions.

HARBOR CREST ELECTRICAL, INC.